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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1938.

HAROLD F. SNYDER, Petitioner,

vs.

CITY OF MILWAUKEE, Respondent.

No. [redacted] 18

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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City of Milwaukee

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to the Supreme Court of the State of Wisconsin

The decision and judgment below is officially reported in **City of Milwaukee v. Harold F. Snyder,** 283 N. W. 301, (decided January 10, 1939). (R. 20)

STATEMENT OF THE CASE

The question raised in this proceeding is the validity of Section 865 of the Milwaukee Code of 1914, which prohibits, among other things, the distribution

of handbills, circulars, dodgers or advertising matter upon the streets, sidewalks, alleys, wharves, public grounds, etc., within the City of Milwaukee. This ordinance is set out in full on page 7 of the printed record.

The petitioner was charged with violating that portion of the City of Milwaukee ordinance which makes it unlawful "* * * to circulate or distribute any circular, handbills, cards, posters, dodgers or other printed or advertising matter * * * in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee." Upon conviction the petitioner appealed to the Supreme Court of the State of Wisconsin, where the decision of the Trial Court was sustained. (R. 20)

REASONS RELIED UPON BY PETITIONER FOR ALLOWANCE OF WRIT

The petition sets forth on pages 4 and 5 four alleged reasons therefor, but as we read the same, it appears that the petitioner relies on one relevant proposition that the Supreme Court of the State of Wisconsin, a court of last resort, has decided a federal question in a way in conflict with applicable decisions of this Court, principally **Lovell v. City of Griffin**, 303 U. S. 444, 82 L. Ed. 660, 58 S. Ct. 666. As to the other reasons for allowance of the writ relied upon by petitioner, they are irrelevant in this proceeding. They may be disposed of as follows:

1. The fact that there are other cases involving the constitutionality of handbill ordinances on appeal before this Honorable Court is irrelevant in consideration of the Milwaukee ordinance, because there it cannot be expected that decisions of state courts in these matters would be uniform.

2. Whether or not the immediate question is of concern throughout the United States is also irrelevant, because the question involves merely the right of a municipality to enact an ordinance as a legitimate and reasonable means of regulation of its streets and highways.

3. Whether or not the decision of the Supreme Court of Wisconsin complained against is contrary to the decisions of the Supreme Courts of or of some courts in other states is also irrelevant. However, the great weight of authority sustains the validity of the Milwaukee ordinance.

These three reasons are merely restatements of one reason which is not persuasive.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

I

This case is not ruled by Lovell v. Griffin.

The decision of **Lovell v. City of Griffin**, 303 U. S. 444, 82 L. Ed. 660, 58 S. Ct. 666, relied upon by the petitioner, merely holds invalid an ordinance that in effect attempts to exercise a pre-publication control under the guise of regulation. However, the principle is recognized in cases upholding limitations upon the distribution of handbills, as for example, those upholding an ordinance against littering the streets with circulars.

The opinion of the Court by Chief Justice Hughes held that the ordinance in question is not limited to "literature" that is obscene or offensive to public morals, nor to methods of distribution "which might

be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, by molestation of the inhabitants or the misuse or littering of the streets."

The identical ordinance involved in the instant case was sustained by the Wisconsin Supreme Court as a valid and constitutional police regulation aimed at preventing the "misuse or littering of the streets." **Milwaukee v. Kassen,** 203 Wis. 383, 234 N. W. 352. The exact ordinance complained of in the instant case formed the basis of the decision in that case. It was held to be a valid and constitutional enactment. The rule as laid down there has not been modified in any respect.

It might be mentioned that there is no interference of the right of free speech or free press in this handbill ordinance of the City of Milwaukee, which is directed solely at the littering of the streets.

This leaves for consideration the sole question of whether the rule laid down in **Milwaukee v. Kassen,** 203 Wis. 383, has been abrogated and overcome by the decision of this Court in **Lovell v. Griffin.** A comparison of the ordinances in the two cases discloses that they are clearly distinguishable inasmuch as the ordinance in the **Griffin** case attempted to delegate to the city manager of Griffin the legislative power of the city council to determine the standards to be applied in any individual case which might arise, plainly an attempt at pre-publication censorship. This distinction has been laid down in the cases of **People v. Young,** (Dec. 9, 1938) 85 P. (2nd) 231, which involves the constitutionality of a Los Angeles handbill ordinance; **Commonwealth v. Nichols,** (December 21, 1938) Mass. Adv. Sheets (1938) 1969, 18

N. E. (2nd) 166, which involves the constitutionality of a handbill ordinance of Worcester, Massachusetts; and **Commonwealth v. Kimball**, Mass. Adv. Sheets (1938) 267, 13 N. E. (2nd) 18, 114 A. L. R. 1440, which involves the constitutionality of a handbill ordinance of another Massachusetts municipality. These cases followed the Wisconsin cases which already had held this identical ordinance a valid enactment.

Other cases, sustaining regulations similar to those in the Milwaukee ordinance contained, follow:

People v. Horwitz, 27 N. Y. Criminal Reports 237, 140 N. Y. S. 437, 439; where the Court held valid an ordinance which provided:

> "That no person shall throw, cast or distribute in or upon any of the streets or public places, or in front yards or stoops, any handbills, circulars, cards or other advertising matter whatsoever."

Allen v. McGovern, 169 A. 345 (N. J. 1933) involving an ordinance prohibiting distribution of unsolicited advertising matter to householders, where the Court held that it was not unconstitutional as unreasonable interference with the right to choose an occupation and to advertise merchandise.

Goldblatt Bros. Corporation v. City of East Chicago, Indiana, (1937) 211 Ind. 621, 6 N. E. (2d) 331. The ordinance there prohibited the distribution of advertising matter by placing the same in automobiles, yards, porches, mail boxes, etc., not in possession or under the control of the person, etc., so distributing, newspapers being exempted from the provisions of the ordinance, and in sustaining the ordinance the Court said:

"The evident purpose of this clause is to enable the city to prevent unwholesome or waste materials from accumulating upon private property. One of the most reasonable means of accomplishing this end is to prevent the unauthorized throwing of substances, which may become waste material, upon private property. It is obvious that the more waste accumulated, the more the expense of the city or property owner in removing it. * * * A city has unquestioned right to remove garbage, ashes, debris, and waste matter that collects upon the property of its citizens. The prevention of unnecessary scattering of material that may become waste is a protection to the municipality itself, since, if waste matter is minimized, the expense of removing it will be less."

In this case the Court also held that the appellant had no property right in the privilege of distributing handbills and advertising matter.

Assuming for the sake of argument that the case of **Lovell v. Griffin,** 303 U. S. 444, 82 L. Ed. 660, 58 S. Ct. 666, is substantially in conflict with the construction of the Milwaukee handbill ordinance and the ruling of the Wisconsin Supreme Court on its validity in the case of **Milwaukee v. Kassen,** 203 Wis. 383, what must be the ruling by the Supreme Court in the instant case? The rule which has been consistently handed down by the Supreme Court of the United States is to the following effect:

"The general rule is that the construction (of a state statute) given by the highest court is conclusive on the Supreme Court of the U. S. where the question involved is whether such statute is repugnant to the federal constitution; and when such interpretation renders it constitutional and valid legislation it will not be disregarded by the U. S. Supreme Court, and a different construction given to the statute which will make it repugnant

to the federal constitution." (6 Ruling Case Law, 86 (Const. Law, Section 85).)

Also:

Marine Nat. Exchange Bank v. Kalt-Zimmers Mfg. Co., 293 U. S. 357, 361, 79 L. Ed. 427, 432;

Bandini Petroleum Co. v. Superior Ct., 284 U. S. 8, 78 A. L. R. 826, 833.

II

There is no conflict in authority that requires the issuance of a writ of certiorari.

There is in fact no conflict between the decision of this Court in the case of **Lovell v. Griffin** and the instant case **City of Milwaukee v. Snyder**, (January 10, 1939), 283 N. W. 301, or **Milwaukee v. Kassen**, 203 Wis. 383 (1931), 234 N. W. 352, in which the Wisconsin Supreme Court upheld the validity of the same Milwaukee ordinance.

It is clear that the right to speak and to publish freely is not absolute, but may be subjected to reasonable restrictions upon the time, place and content of its exercise; abuses arising out of such freedom may be punished in the exercise of police regulations.

Petitioner argues that the remedy for littered streets is not to prohibit the distribution of handbills, but to enforce the laws against letting them fall on the street or sidewalk. In order to prevent the accomplishment of something regarded as an evil, effectively, it is often best to prohibit an act which might be innocent in itself, but may lead to the evil. This Court stated in **Purity Extract & T. Co. v. Lynch**, (1912) 226 U. S. 192, 33 S. Ct. 44, 46, 57 L. Ed. 184, 187:

"It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (Cases cited.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

Consequently there is no conflict in authority that justifies the issue of a writ of certiorari in face of the fact that the individual's exercise of free expression may incidentally seem to be curbed by forbidding the distribution of handbills on public streets.

San Francisco Shopping News Co. v. City of South San Francisco, 9 Cir., 1934, 69 F. (2d) 879, certiorari denied 293 U. S. 606, 55 S. Ct. 122, 79 L. Ed. 697.

In **Thomas Cusack Company v. City of Chicago,** 242 U. S. 526, 61 L. Ed. 472, involving the question of the constitutionality of a billboard ordinance, the Supreme Court held the ordinance to be valid and constitutional. The Court said:

"We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when

it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. **Jacobson v. Massachusetts,** 197 U. S. 11, 30, 49 L. Ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765."

III

Decisions relied upon by petitioner do not disclose a conflict in authority.

The case of **People v. Armstrong,** 73 Mich. 288, 41 N. W. 275, found on page four of petitioner's brief, involved the distribution of Y. M. C. A. circulars. The record shows that there was no littering of the streets by the handbills.

C. I. O. v. Hague, Mayor, 25 F. Supp. 127, is not in point because in that case the mayor attempted to act as sole arbiter as to who should have the right to distribute circulars or to conduct meetings; which right to circularize handbills or conduct meetings was dependent upon the mayor's approval of such meeting or handbill.

The City of Milwaukee, however, is not interested in the contents of circulars or what political or economic doctrine may be expounded therein.

The purpose of the Milwaukee ordinance was the lawful purpose of preventing littering of the streets. Such construction was made by the Wisconsin Supreme Court in **Mittleman v. Nash Sales, Inc.,** 202 Wis. 577.

The method of enforcement of the 1914 Milwaukee ordinance is a legitimate and reasonable means of regulation. The method of enforcement by law officers of the City does not affect its validity.

In **Manos v. City of Seattle**, et al., 146 Wash. 210, 262 P. 965, it was argued that the administration of a Seattle ordinance had been discriminatory, but the Court said:

> "The ordinance itself does not permit of discrimination between persons on the part of the officers whose duty it is to enforce it, and the remedy for its mal-administration on their part is not to declare the ordinance void. Few laws would have force or effect if their validity depended upon the question whether they were always impartially administered."

It was held in **Marblehead Land Co. v. Los Angeles** (U. S. C. C. A.) 47 F. (2d) 528, 532, affirming 36 F. (2d) 242, that when the unreasonableness or arbitrariness in the exercise of the police power is fairly debatable, courts will sustain the ordinance.

A police ordinance will be sustained unless it appears that it bears no relation to public health, safety, morals, or welfare. **Pacific Railways Advertising Co. v. Oakland**, 98 Cal. App. 165, 276 P. 629. In the instant case the Court found that the ordinance was enacted in the public welfare; that is, to prevent misuse of, befouling of, and littering of streets. The case of **Milwaukee v. Kassen**, 203 Wis. 383, is controlling in that respect as having interpreted the identical ordinance under identical circumstances as are in the instant case, where the Supreme Court of the State of Wisconsin declared that the ordinance was aimed at the littering of the streets, citing a previous Wisconsin decision.

Counsel for petitioner cites the case of **Yick Wo v. Hopkins**, 118 U. S. 356, 30 L. Ed. 220, 227, found on page 18 of his brief, as holding that notwithstanding

the fact that a law may be fair on its face, if the method of administration is discriminatory and deprives the persons of their constitutional rights, this renders the law invalid under the Fourteenth Amendment of the United States Constitution. In the **Yick Wo** case, 118 U. S. 356, an ordinance was involved pertaining to the regulation of laundries admittedly enforced only against the Chinese. The court held that the unjust discrimination constituted a "denial of equal justice" within the prohibition of the constitution.

No claim is made in the instant case that there is any discrimination as to any known class or group of persons against whom the ordinance is enforced. On the contrary, the testimony was clear that where there was a violation of the law, that is where littering of the streets was caused by any person distributing handbills, that the police department of the City of Milwaukee would be vigilant in preventing any such violation of the city code.

It is apparent from the record in this case that there was no such thing in the enforcement of the Milwaukee ordinance as would indicate arbitrary or unjust discrimination in favor of one class as against another class. The police department, using the ordinary understanding of the word "distribute," interpreted it to mean the passing out of handbills on the streets, highways, alleys, and public places of the City of Milwaukee. (R. 17)

An isolated instance of where one individual, having received a handbill, inadvertently permits it to fall to the pavement, would certainly not constitute littering the streets, the word "littering" meaning the falling of more than one, or numerous handbills to the pavement.

The uncontroverted testimony indicates that there was littering on Vliet Street at the Place alleged by the city. (R. 14)

CONCLUSION

Neither the petition nor the brief in support thereof has disclosed a question of sufficient importance or conflict of authority, or that the Supreme Court of the State of Wisconsin has decided a federal question in a way in conflict with applicable decisions of the United State Supreme Court so as to require the issuance of the writ of certiorari. There is no doubt but that the ordinance was enacted under ample authority.

It is clear that the means adopted by the enforcement authorities was a legitimate and reasonable means of regulation directed solely at the littering and misuse of the public streets. The Wisconsin Supreme Court in three cases, **Mittleman v. Nash Sales, Inc.**, 202 Wis. 577, **Milwaukee v. Kassen**, 203 Wis. 383, 234 N. W. 352, and **Milwaukee v. Snyder**, (January 10, 1939) 283 N. W. 301, has determined that the Milwaukee ordinance is constitutional.

The general rule is that the construction of a state statute given by the highest state court is conclusive on the Supreme Court of the United States where the question involved is whether such statute is repugnant to the federal constitution; and for such interpretation rendered constitutional and valid legislation it will not be disregarded by the United States Supreme Court and a different construction given to the statute which will make it repugnant to the federal constitution. 6 **R. C. L.** 86, Constitutional Law, Section 85.

We respectfully submit, therefore, that the decision of the Wisconsin Supreme Court upholding the decision of the trial court, the Circuit Court of Milwaukee County, does not commend this case for review on writ of certiorari under the rules and decisions of this court.

Respectfully submitted,

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